

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ERIC KLOPMAN-BAERSELMAN, as Personal
Representative for the Estate of RUDIE
KLOPMAN-BAERSELMAN, deceased,

Plaintiffs,

v.

AIR & LIQUID SYSTEMS CORPORATION, et al.,

Defendants.

NO. 3:18-CV-5536-RJB

DCO LLC'S OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE AMENDED
COMPLAINT

NOTED ON MOTION CALENDAR:
March 1, 2019

I. INTRODUCTION

DCo LLC respectfully makes a limited appearance to respond to Plaintiff's Motion for Leave to Amend Complaint (Dkt. # 154), which seeks to add DCo as a defendant. The motion claims that "DCo's counsel" already has participated in the litigation and for this and other reasons, DCo will not be prejudiced by amendment.¹ Gordon Thomas Honeywell represents another defendant in this case; it cannot and should not be charged with having participated in this case for DCo when DCo was neither identified in nor served with the Complaint. The fact that Victor gaskets (a product for which DCo would be liable) was identified in discovery still does not put the onus on Gordon Thomas

¹ The Motion notes that DCo LLC formerly was known as Dana Companies LLC, and refers to it as "Dana." In this Opposition, DCo LLC styles itself as "DCo."

1 Honeywell to begin participating in the case for DCo because they would not have been
2 authorized to do so. The Court should not alter the mechanism by which the justice
3 system operates or an attorney-client relationship in a case is created just because of
4 Plaintiff's counsel's mistaken belief that DCo was already a defendant in the case.
5

6 This is the *fourth* occasion on which Plaintiff has sought or received permission to
7 amend the pleadings. The request comes nearly sixteen months after the filing of the
8 original complaint, more than two months after the Case Scheduling Order's December
9 3rd deadline to join additional parties, and – perhaps most significant – more than two
10 months after Plaintiff's counsel was directly informed that DCo was not a party in this
11 case. DCo thus feels compelled to respond by noting that it has not been made a party
12 to this lawsuit and (until this pleading) has not participated in any of its proceedings. This
13 case has been going on for some time absent any participation by DCo. DCo has not
14 participated in the deposition of any witnesses, propounded fact discovery, retained
15 experts, or conducted its own investigation of Decedent's alleged Victor-related
16 exposures or alternative exposures. Yet, according to Plaintiff's discovery responses to
17 another codefendant, Plaintiff identified the existence of Victor gaskets in witness Ray
18 Smith's garage and had them tested by one of Plaintiff's experts as early as July 2018.
19 DCo has not tested these gaskets and does not know of the nexus between any gasket
20 from Ray Smith's garage and Decedent's asbestos exposure.
21

22 Plaintiff fails to articulate the required good cause as to why he should be
23 permitted to disturb the Court's Case Scheduling Order. Furthermore, Plaintiff's proposed
24 amendment is the product of undue delay and would be manifestly prejudicial and unfair
25 to DCo. DCo respectfully requests that, as a matter of procedure and equity, the Motion
26 be denied.

II. FACTUAL BACKGROUND

A. The case was originally filed in state court and even then had amendment deadlines

The original complaint in this matter, naming twenty-eight defendants, was filed in Pierce County Superior Court, on October 27, 2017. Dkt # 68-1 at 3-18. Upon its filing, the Superior Court issued a scheduling order setting a trial date of October 25, 2018, and a deadline for providing a Confirmation of Joinder of Parties, Claims and Defenses of February 23, 2018. Dkt # 68-1 at 2. On February 28, 2018, such a Confirmation of Joinder Claims and Defenses was filed in Superior Court. Dkt # 68-1 at 408-409. While it indicated that an additional party would be joined, the Confirmation of Joinder procedure in state court puts the parties on clear notice of the need to attend to proper joinder of parties and claims so the case can be properly litigated.

On May 14, 2018, Plaintiffs filed a motion in Superior Court seeking leave to amend the complaint to name a personal representative as plaintiff and to add six new defendants. Dkt # 68-1 at 688:20 – 689:2.² Significantly, several of these new defendants were additional manufacturers or sellers of retail auto parts. In fact, one of them was NAPA, which Plaintiffs' motion to amend describes as "similarly aligned with Dana" because it sold Plaintiffs the Dana product at issue (Victor automotive gaskets). Motion at 4:8-10. The motion to amend was granted, and an Amended Complaint was filed in Superior Court on June 1, 2018. Dkt # 68-1 at 743-744.

² Borg Warner Morse Tec, LLC, as successor-by-merger to Borg Warner Corporation; DAP Products, Inc.; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Henry Company, LLC; National Automotive Parts Association a/k/a NAPA; and The W.W. Henry Company, L.P.

1 In the meantime, in conjunction with these amendments, Plaintiffs proposed that
 2 the parties stipulate to continuing the trial date, from October 2018 to March 18, 2019.
 3 Plaintiffs' proposed stipulation contained a new case schedule with a deadline for
 4 Confirmation of Joinder of Parties, Claims and Defenses of August 10, 2018. Declaration
 5 of Michael E. Ricketts ("Ricketts Decl."), Exhibit 1 (email from plaintiff's counsel
 6 forwarding proposed amended case schedule). The stipulation to continue the trial date
 7 as agreed among the parties suggested a new trial date of between March and May
 8 2019, but did not propose other case schedule deadlines. Dkt # 68-1 at 733-737. Per
 9 an order entered May 15, 2018, the Superior Court continued the trial date to March 6,
 10 2019. Dkt # 68-1 at 738. An amended case schedule then issued by the Superior Court
 11 Clerk did not contain a new deadline for Confirmation of Joinder of Parties, Claims and
 12 Defenses, presumably because that deadline had already passed prior to the
 13 continuance being ordered. Dkt # 68-1 at 739.

14
 15 **B. Following removal to this Court, the case was given new amendment deadlines**

16 On July 3, 2018, this matter was removed to this Court. Dkt # 1. On July 11,
 17 2018, this Court entered its Order Regarding Initial Disclosures, Joint Status Report, and
 18 Early Settlement, which, in accordance with Rule 16(b)(3)(A), Fed.R.Civ.P, required the
 19 parties to submit a Joint Status Report containing "[a] proposed deadline for the joining
 20 of additional parties." Dkt. # 15 at 2:9. In accordance with that requirement, on October
 21 9, 2018, the parties submitted a Joint Status Report proposing such a deadline:
 22

23 **3. PROPOSED DEADLINE FOR JOINING ADDITIONAL PARTIES.**

24 December 3, 2018.

25 Dkt. # 111 at 2:11-12.
 26

1 The Court then entered its Minute Order Setting Trial and Pretrial Dates, which
2 included the following:

3 Deadline for the FILING of any motion to December 3, 2018
4 join parties

5 Dkt. # 113 at 1:14.

6 Since removal, Plaintiff has twice before sought leave to amend his pleadings.
7 Dkt. # 72; Dkt. # 90.

8 **C. DCo has never been named as a party and has never participated in the case**

9 Despite Plaintiff several times having amended his pleadings and adding new
10 defendants, Plaintiff never has named DCo as a party or listed it in any proposed
11 amended pleading until the filing of the present motion, on February 14, 2019. Nor has
12 DCo heretofore participated as a party in this lawsuit in any fashion. The motion
13 mentions “DCo’s counsel,” in apparent reference to a lawyer from Gordon Thomas
14 Honeywell in attendance at depositions in the matter. Gordon Thomas Honeywell does
15 represent DCo in local asbestos matters (and is presenting this opposition on DCo’s
16 behalf). But it also represents various other defendants in various asbestos matters.
17 Ricketts Decl. at ¶ 6³ Its appearance at prior depositions in this matter was on behalf of
18 – and only on behalf of – one of those other clients, Pneumo Abex LLC. Gordon Thomas
19 Honeywell was not retained to represent DCo in this matter prior to the filing of this
20 motion, which is hardly surprising given that DCo had not been named a party. Ricketts
21 Decl. at ¶¶ 3-4.
22
23
24

25 ³ Gordon Thomas Honeywell currently represents DCo in one other pending matter brought by Dean Omar
26 Branham. However, it also represents five other defendants in other Dean Omar Branham matters in which
DCo is not and never has been a party. Ricketts Decl. at ¶ 6.

III. LEGAL AUTHORITY AND ARGUMENT

A. Under Rule 15, Fed.R. Civ. P., leave to amend should be liberally granted but bad faith, undue delay, prejudice, and futility must be considered

Amendments to pleadings implicate Rules 15 and 16, Fed.R. Civ. P. *Lochridge v. City of Tacoma*, 315 F.R.D. 596, 598 (W.D. Wash. 2014). Except for amendments made “as a matter of course” or pursuant to a stipulation, leave of court is required to amend a pleading. Rule 15(a), Fed.R. Civ. P. In determining whether leave to amend is appropriate, the “district court considers ‘the presence of any four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility.’” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999); *Lochridge*, 315 F.R.D. at 598 (“Although leave to amend is liberally granted, undue delay, bad faith, or undue prejudice are grounds for denying leave.”).

The determination of “delay” turns on whether “the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.” *Jackson*, 902 F.2d at 1388. A party “contending that it learned ‘new’ facts to support a claim should not assert a claim that it could have pleaded in previous pleadings.” *Lochridge*, 315 F.R.D. at 600. “[L]ate amendments to assert new theories are not reviewed favorably when the facts and theory have been known to the party seeking amendment since the inception of the cause of action.” *Acri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986).

Prejudice can also be established by demonstrating that a motion to amend was made after or near discovery deadlines. *Lochridge*, 315 F.R.D. at 600. Furthermore, when “additional discovery would have to be undertaken because the amended pleading contains different legal theories and requires proof of different facts, the opposing party

1 may be prejudiced.” *Id.* (citations omitted). Prejudice can also exist where Plaintiff’s
 2 proposed amendments would “cause added time and expense” for the defendant. See
 3 *Riedesel*, 2015 WL 4227014, at *2; *Jackson*, 902 F.2d at 1387-88 (“Putting the
 4 defendants through the time and expense of continued litigation on a new theory, with
 5 the possibility of additional discovery, would be manifestly unfair and unduly prejudicial.”)
 6 (citations omitted).
 7

8 **B. Under Rule 16, Fed.R. Civ. P., once the deadline for adding parties has**
 9 **passed, leave to amend to add parties requires a showing of good cause**

10 While amendments of pleadings are a topic of Rule 15, once a scheduling order
 11 has been entered pursuant to Rule 16(b)(1), Fed. R. Civ. P., a “showing of ‘good cause’
 12 for amendment must be made if the scheduling order’s deadline for amending pleadings
 13 has passed.” Rule 16(b), Fed. R. Civ. P.; *Lochridge*, 315 F.R.D. at 599 (citing *Johnson v.*
 14 *Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)). Such a showing is
 15 required because:

16 Permitting the amendment to add a new cause of action
 17 would necessarily require the Court to extend the discovery
 18 deadline to permit the Defendant to respond to the new
 19 allegations. The amendment would also require an
 20 extension of the deadline for dispositive motions in order
 21 that the Defendants may challenge the claim, if appropriate.
 22 Good cause must be shown to justify any modification of the
 23 scheduling order.

24 *Id.*

25 The “good cause” analysis under Rule 16 primarily consists of the diligence of the
 26 party seeking amendment. *Johnson*, 975 F.2d at 609 (“[C]arelessness is not compatible
 with a finding of diligence and offers no reason for a grant of relief”). Notably, while
 courts consider factors including prejudice in considering granting leave to amend, if the

1 moving party was not diligent “the inquiry should end” there and the motion should be
2 denied. *Id.*

3 **D. Plaintiff’s lack of diligence and undue delay calls for denial of the motion**

4 Fourteen months passed from the time Plaintiff first filed his complaint until this
5 Court’s deadline for adding new parties expired. During that interval in which prior state
6 court deadlines for confirming joinder of parties also passed, and in which Plaintiff three
7 times moved to amend his complaint to add new parties, Plaintiff never sought leave to
8 add DCo as a party – despite characterizing DCo as a “target defendant.” Motion at
9 43:25. Plaintiff’s only justification for this failure (which is offered without any evidentiary
10 support) is his counsel’s mistaken belief that DCo had been named as a defendant
11 because “its counsel” had appeared at all depositions in the case. Motion at 2:5-6. As
12 explained above, however, there was no reason in the first place for drawing such a
13 conclusion. Plaintiff’s counsel, or at least someone, apparently drew that conclusion
14 from the fact that an attorney from Gordon Thomas Honeywell was in attendance. But
15 that appearance was behalf of another defendant, Pneumo Abex.
16

17 That situation was no different than any number of other cases in which Gordon
18 Thomas Honeywell currently represents one or more defendants – but not DCo – in
19 matters brought by plaintiff’s counsel Dean Omar Branham. If Plaintiff’s counsel needed
20 to confirm who they had sued, they could have reviewed the original or the several
21 amended complaints they have filed in this matter; none of them named DCo. If they
22 wanted to see what parties were represented at a deposition in this matter, they could
23 have reviewed the appearances listed in the transcript; no transcript shows an
24
25
26

1 appearance by Gordon Thomas Honeywell for any defendant than Pneumo Abex.⁴ The
 2 Motion perhaps provides a candid explanation as to how this situation came about, but it
 3 does not demonstrate diligence or the absence of undue delay necessary to justify a
 4 pleading amendment in disregard of the Case Scheduling Order.

5
 6 Moreover, Plaintiff has delayed bringing this Motion even after this excuse
 7 disappeared. During depositions held in December, Plaintiff's counsel was directly told
 8 by the Gordon Thomas Honeywell lawyer in attendance that she was not appearing for
 9 DCo but for another defendant, Pneumo Abex, and that DCo was not in the case.
 10 Pearson Decl. at ¶ 4. Plaintiff still waited nearly two months to bring this motion, all while
 11 the deadline for adding parties receded further into the past and while the remaining
 12 time in which to disclosure experts, conduct discovery, and otherwise prepare this matter
 13 for trial continued to shrink.

14 While lack of diligence alone defeats a claim of good cause, here, prejudice to DCo
 15 is manifest. Plaintiff (and other defendants) have known of this matter for sixteen
 16 months, and have known of impending deadlines for expert disclosures and the close of
 17 discovery since this Court entered its Case Scheduling Order last October. Plaintiff has
 18 identified Victor gaskets his counsel located in the garage of a family friend, Raymond
 19 Smith, as relevant to Plaintiff's claims of asbestos exposure, and sent them to a testing
 20 laboratory in early July of last year, yet apparently took no action until now to assert any
 21 claims against DCo. With the filing of this Motion, less than sixty days now remain until
 22

23
 24 _____
 25 ⁴ The Motion states that at one deposition, Plaintiff's counsel *inquired of other defense counsel* whether
 26 DCo had appeared. Motion at 2:7-9. The Motion does not explain if the inquiry was whether "counsel for DCo" had appeared, or simply whether a lawyer from Gordon Thomas Honeywell had appeared. Plaintiff's counsel apparently mistook the two to be synonymous. In any event, Plaintiff's counsel did not take the trouble to engage counsel who he thought was representing DCo until a week later, when his misimpression Declaration of Patricia T.O. Pearson ("Pearson Decl." at ¶¶ 2-4.

1 DCo, if it is added, is to disclose what experts it would retain; only 120 days remain for
 2 DCo to conduct any discovery it believes necessary. Plaintiff's Motion argues that
 3 "[DCo's] lawyers have actively participated in the discovery phase, including attending
 4 and actively participating in all of the depositions taken in this case to date." Motion at
 5 4:7-8. That statement is false and simply perpetuates the problem that brought us to this
 6 situation in the first place, of assuming that Gordon Thomas Honeywell's earlier
 7 participation in this matter was on behalf of DCo, when it was not.
 8

9 IV. CONCLUSION

10 The importance of a deadline for joining other parties is borne out by the fact that
 11 Rule 16(a)(3)(A), Fed.R.Civ.P., requires that the scheduling order in every case set one.
 12 One was set in this case; Plaintiff has long known of this requirement, and has had
 13 months, and multiple other occasions to amend, to comply with it with regard to DCo.
 14 When Plaintiff's (inexplicable) misunderstanding about DCo never having been made a
 15 party was correct, Plaintiff waited still longer to bring this Motion. Regardless of its ability
 16 to retain lawyers previously involved with the case, DCo would be prejudiced by having to
 17 be brought into the case under its current schedule. Leave to amend should not be
 18 granted, and good cause does not exist to alter the Case Scheduling Order to allow it.
 19 The Motion should be denied.
 20

21 Dated this 25th day of February, 2019.

22 GORDON THOMAS HONEYWELL LLP

23 By: /s/ Michael E. Ricketts

24 Michael E. Ricketts, WSBA No. 9387

25 mricketts@gth-law.com

26 Attorneys for DCo LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2019, I electronically filed the foregoing with the Clerk of the court using CM/ECF which will send notification of such filing to the following:

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DATED this 25th day of February, 2019.

/s/ Savanna Stevens
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